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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ALEX KERMITH MENDOZA, Defendant and Appellant.	E048408 (Super.Ct.No. RIF125661) **OPINION**

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge. Affirmed.

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lilia E. Garcia and Raquel M. Gonzalez, Deputy Attorneys General, for Plaintiff and Respondent.

On the night of August 27, 2005, Pamela Sieber left her three-year-old son, Michael "Mikey" Vallejo Sieber, in the care of her boyfriend, defendant Alex Kermith Mendoza, while she went to work at a strip club. When Pamela arrived home at 2:30 a.m. on August 28, 2005, Michael appeared to be sleeping peacefully in defendant's bedroom, and defendant was watching a movie with his roommate, Richard Daniel Cox.[1] Defendant said nothing about Mikey being injured. In the middle of the night, Mikey stopped breathing. He was rushed to the hospital, where he was revived. He lived for 30 hours but eventually succumbed to numerous blunt force injuries that had been inflicted on him. Autopsy results revealed numerous internal injuries, a fractured skull, and injuries to Mikey's penis and rectum.

Defendant was convicted of first degree torture murder and assault on a child under the age of eight causing death.

Defendant now contends:

1. Insufficient evidence supported his conviction of first degree torture murder.

2. This court, if it rejects his first contention, should nonetheless reduce his conviction to second-degree murder as his conduct only amounted to second degree murder.

We affirm the judgment.

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[1] Cox was tried separately and convicted of first degree torture murder and assault on a child under the age of eight causing death. Cox's conviction has been affirmed on appeal. (*People v. Cox* (Feb. 17, 2009, E043487) [nonpub. opn.].)

I

PROCEDURAL BACKGROUND

A jury found defendant guilty of the first degree torture murder (Pen. Code, §§ 187, 189)[2] and a separate count of assault on a child under the age of eight causing death (§ 273ab).[3] The trial court sentenced defendant to state prison for the indeterminate sentence of 25 years to life on the first degree torture murder. The trial court imposed an additional sentence of 25 years to life on the assault on a child conviction, but it stayed that sentence pursuant to section 654.

II

FACTUAL BACKGROUND

A. *Prosecution*

1. *Events leading up to Mikey's murder*

On August 12, 2002, 23-year-old Pamela Sieber gave birth to Mikey.[4] Mikey's father was Francisco Vallejo, the son of Lidia and Salomon Vallejo. Francisco had been

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[2] All further statutory references are to the Penal Code unless otherwise specified.

[3] Defendant was originally charged with the special circumstance of torture murder (§ 190.2, subd. (a)(18)) and elder abuse (§ 368, subd. (a)). The People initially declared they were seeking the death penalty. The elder abuse charge was severed from the instant trial and was later dismissed pursuant to section 1385. The torture murder special circumstance was dismissed based on defendant's section 1118.1 motion because the trial court concluded there was not enough evidence of defendant's intent to kill Mikey.

[4] Sieber was in custody for her conviction of child endangerment due to her actions in leaving Mikey with defendant.

incarcerated since 2002 and had "not been around." In August 2005, Sieber was working at a strip club. She met defendant at the strip club in July 2005. They immediately began a relationship.

Sieber began staying the night at defendant's house and took Mikey with her. Defendant lived with his father, who was an invalid, and Richard Daniel Cox, who was his roommate. After only dating for about two weeks, Sieber and defendant worked out an arrangement that Sieber would take care of defendant's father during the day while defendant worked, and defendant would take care of Mikey at night while Sieber worked.

Sieber saw defendant hit Mikey in the head on two occasions prior to August 27, 2005. Defendant had told Sieber that he thought Mikey was "sort of a little sissy . . . ." Defendant had hit Mikey in the face with a dodgeball and told Sieber he was just trying to "toughen [him] up . . . ." Defendant told Sieber he wanted to make Mikey a "little soldier."

Sieber thought that defendant was mean to Mikey based on his hitting Mikey in the head, poking him, and telling him to beat up a doll Mikey had. Sieber was going to leave defendant, but he promised her he would stop hurting Mikey because he loved her. Sieber admonished defendant not to discipline Mikey.

A week prior to Mikey's death, Sieber observed bruises on Mikey's ribcage. Sieber asked Lidia and Salomon, and she claimed Salomon told her Mikey fell on some

stairs while on a trip to Mexico.[5] Defendant had been alone with Mikey prior to the time the bruises were seen, but he denied knowing anything about them.

On Thursday, August 25, Lidia had changed Mikey's diaper and she had not observed any injuries to his body, including his penis or anus. He seemed fine and happy. The Monday before his death, Mikey had stepped on a charcoal briquette from a barbeque and burned his foot while he was with Lidia and Salomon.[6]

Salomon dropped off Mikey at defendant's house on Friday, August 26. Mikey reluctantly gave defendant a hug when asked to by defendant. Sieber indicated Mikey was acting normal and had no injuries. Defendant put Mikey to bed that night. On Saturday morning, August 27, Mikey was fine.

2. *August 27, 2005*

On August 27, Sieber went to work at 6:00 p.m. and left Mikey in defendant's care. Mikey was only wearing his diaper at the time and had no visible bruises. Mikey complained his stomach hurt, and he did not want Sieber to go to work. Sieber touched Mikey's stomach and did not notice anything wrong.

Sieber worked with Stacy Mestaz. After work, around 2:00 a.m., Mestaz followed Sieber to defendant's house. They arrived around 2:30 a.m. When they arrived, defendant and Cox were sitting on the couch watching a movie.

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[5] Lidia and Salomon denied this at trial.

[6] Sieber testified that the burn occurred "a couple" weeks prior to Mikey's death.

Sieber asked defendant where Mikey was, and he indicated Mikey was in the bedroom sleeping. Defendant told Sieber not to wake him up. Mestaz asked to see Mikey. Defendant told Sieber not to go in the room because he did not want to disturb the boy. When Mestaz insisted that she wanted to see Mikey, Cox and defendant looked at each other and appeared "nervous." Cox's eyes "opened wide," and defendant said, "You know how he gets; let's not wake him up."

Mestaz and Sieber went to defendant's room, where Mikey was sleeping. Mikey was covered up to his chin with the blankets and was lying very still. There was very little light in the room. It appeared as though he had not moved the entire night. He moved one time while they were in the room and appeared to gasp for air. Mestaz thought by the way he was so still and gasping for air that he might be sick. Sieber believed he was just sleeping.

Mestaz and Sieber went back to the living room. They both fell asleep. Sieber was awakened by defendant at 4:00 a.m., who told her Mikey was not breathing. Sieber thought that Mikey was having an asthma attack. She ran and found Mikey in the bedroom; he did not appear to be alive. He was not moving or breathing. Defendant claimed that he had found Mikey on the floor having convulsions. Sieber asked defendant to call 911; he told her it would be faster to drive to the hospital. Sieber tried to revive Mikey.

Mestaz, Sieber, and defendant all drove together to the hospital. Sieber kept asking defendant what was wrong with Mikey, and he said Mikey had been fine when he

put the child to bed. Mestaz and Sieber observed several bruises on Mikey's back. These bruises were not present when Sieber left Mikey with defendant that evening. Sieber was screaming at defendant asking him what the "fuck" had happened to Mikey. Defendant denied he did anything. He said Mikey played in the backyard with them, he gave Mikey a sip of beer, and then they put him to bed.[7] Defendant drove quickly to the hospital, running red lights at Sieber's insistence.

3. *Hospital*

Defendant let Sieber out of the car at Riverside Community Hospital on August 28 around 4:00 a.m. She was frantic and asked for help for Mikey. Sieber told defendant to come in, but he claimed he needed to go back to the house to get Cox. Sieber was unsure whether defendant left.

Mikey was taken from her by emergency room personnel, who thought Mikey was dead. Mikey was blue and was not breathing. He had no pulse. Resuscitation efforts were made. Mikey was never able to breathe on his own, but his heart started again. He had no brain activity.

The emergency room doctors and nurses noted that Mikey had bruises on his head, his side, and his groin area. He had a purple bruise and swelling on his penis and trauma to his rectum, including abrasions, bruising, and what appeared to be bloody discharge

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[7] This was the first time Mestaz had said that defendant had given Mikey beer.

coming from his rectal area. He had burns on his feet. Mikey appeared to be suffering from internal bleeding.

Mestaz stayed at the hospital with Sieber. Defendant and Cox eventually came in, about an hour later. While Cox and defendant were at the hospital, they were "joking" with each other and laughing. Sieber testified, however, that defendant was pacing outside the hospital and appeared serious about the situation.

4. *Investigation*

Defendant, Cox, Sieber, and Mestaz were summoned to the police station. Cox and defendant continued to joke at the station. Defendant did not appear concerned about Mikey's condition, even though he was present when doctors told them that Mikey was not doing well and that there was only a slim chance he would live.

While Sieber was in a holding cell, defendant tried to talk to her. Defendant told her that he did not do anything to Mikey because he loved him and Sieber; he accused Cox of the beatings.

Riverside Sheriff's Deputy Roman Pluimer interviewed defendant at 5:00 p.m. on August 28, 2005. A transcript of the interview was prepared, and a videotape of the interview was shown to the jury.

Defendant first denied that Mikey was a discipline problem; he said Mikey was "great." Defendant indicated that Mikey complained that his stomach hurt that night, and he drank a lot of water. Defendant said that Cox went by himself to the video store while

they were watching Mikey. Defendant checked on Mikey at 1:30 a.m., and he was sleeping peacefully.

About 4:00 a.m., defendant woke up because he heard a sound. He went into the bedroom and found Mikey laying on the floor in convulsions. He was not breathing. Defendant woke up Sieber, telling her that Mikey was having an asthma attack. He did not call for an ambulance because he thought it would take too long. He denied he left the hospital. He first denied that he ever hit Mikey prior to that night but admitted he would throw the boy on the bed, playing. He admitted that he played roughly with Mikey. Defendant denied that any of the injuries to Mikey were his fault.

Defendant next stated that he threw Mikey on the bed that night, and Mikey bounced off the bed. Mikey was crying but recovered. Defendant indicated that the way he fell it appeared that he had "snapped his neck." Defendant wrestled and played rough with Mikey for 10 to 15 minutes. Defendant said he was afraid to tell Sieber that he played "too roughly" with Mikey. Defendant said Mikey was crying after they were playing. Defendant put him to bed, and he *and* Cox went to the video store.

Defendant next said that Mikey defecated in his diaper. Defendant thought he should be potty trained. Defendant told Mikey to eat his feces or he would spank him. Mikey ate his feces. Defendant admitted that he picked up Mikey and was throwing him. Mikey was crying and not having fun. This started around 8:00 p.m. Defendant was concerned Mikey was hurt, but he went to the video store with Cox anyway.

Finally, defendant admitted that he held Mikey against the wall and kicked him in the chest to try to get him to calm down. He punched or kicked Mikey for 10 to 15 minutes on the back and stomach. He denied burning Mikey, however.

A receipt from a video store dated August 27, 2005, at 10:06 p.m. was found at defendant's house.

5. *Medical Evidence*

Dr. Stephen Treiman was a pediatric critical care doctor who worked at Loma Linda University Medical Center. On August 28, he treated Mikey, who had been transferred from Riverside Community Hospital. Mikey was nonresponsive upon arrival, was intubated, and was on medication to maintain his blood pressure. He had bruises on his legs, head, arms, and back — "almost from head to to[e]"; he also had discoloration on his penis, and the skin was broken on his anus. Mikey had bleeding in the abdomen, there was a laceration on his liver and his bowels were suffering from lack of blood flow. Mikey's abdomen was distended, which was most likely caused by blunt force trauma to the liver and abdomen. Many of the organ failures in Mikey's body could be attributed to a lack of oxygen. A rectal exam was performed, and it was noted that there was "sloughing" off of rectal tissue and a tear in the rectum. The tear to the rectum and the inflammation around the rectum were likely caused by some trauma.

Dr. Treiman indicated that the injuries to Mikey were caused by "significant blunt force" equivalent to falling from a two-story building. Dr. Treiman and another doctor

who examined Mikey at Loma Linda did not believe the injuries were accidental. The only reasonable conclusion was that Mikey had been abused.

Mikey died on Monday, August 29, during surgery being performed to repair the injuries to his abdomen to help him breathe. Mikey died because he could no longer breathe on his own, and his heart stopped.

Dr. Steven Trenkle performed an autopsy on Mikey on August 31, which revealed the following: Mikey had a mark over his left eye. There was a bruise in the center of his forehead that had been recently incurred. There was evidence of dead bowel. He had a bruise on his right thigh. There were older abrasions and scratches on his arms. He had several bruises on his back. One of his ribs had been recently fractured.

Mikey's bowels were swollen and red. The tissue and muscle in the abdomen behind the organs were dark and bluish when they should have been tan or pink. This discoloration would have been caused by either a hard blow to the abdomen area or a hard fall on a blunt object. The type of fall that would cause such an injury or the force of the blow that would be required would cause a person who observed it to immediately call 911 for an ambulance. There were tears on the outside body of the liver and a large tear inside. This injury would be caused by blunt force injury to the abdomen. The injuries to Mikey's abdomen and liver occurred within hours of his coming into the emergency room.

There was redness and swelling on Mikey's penis. It was consistent with either being burned or being grabbed. Mikey had an abrasion on his buttocks. He had a tear on

the skin on his anus. There was some sort of blunt force trauma done to Mikey's right testicle. There was hemorrhaging into the rectal area that was deep and not just superficial; it had been recently inflicted. Dr. Trenkle believed the hemorrhaging in the rectum was caused by a penetrative injury.

There was hemorrhaging around Mikey's kidneys caused by blunt force trauma to the abdomen, hemorrhaging in the diaphragm, and blunt force trauma to the bowels. The injuries had to have occurred no more than 24 hours prior to being admitted to the emergency room.

Mikey had a fracture on the back of his skull. There was hemorrhaging around the fracture. The skull fracture was caused either by a blow from a blunt object or by Mikey being thrown against a blunt object. The area where the skull fracture occurred was thicker than the rest of the skull and would have required a significant amount of force. Mikey would have been in pain from the injury. Dr. Trenkle did not believe that falling off of a bed and hitting a dresser would have caused this skull fracture.

Dr. Trenkle concluded that Mikey died from multiple blunt force injuries. He had multiple organ failures at the time of his death. The blunt force injury to his abdomen caused the organs to fail, which led to his death. Mikey would not have been acting normal after the blows to his abdomen. The fatal injuries occurred within 12 hours of Mikey being brought to Riverside Community Hospital.

B. *Defense*

Defendant presented evidence that Lidia took Mikey to the pediatrician on August 15, and he had a cut over his eye. Although Sieber told Lidia that he got it from falling on a table, Mikey told Lidia, who told Mikey's pediatrician, that Sieber had hit him. Child protective services was contacted.

Dr. Janice Ophoven was a pediatric forensic pathologist. She reviewed most of the records pertaining to Mikey. She opined that Mikey had preexisting abdominal injuries suffered prior to 6:00 p.m. on August 27. She could not say these caused his death. She also surmised, by looking at the autopsy pictures, that the rectum hemorrhaging could have been caused by something stuck in Mikey's anus, but it could also have been from probes used at the hospital. Dr. Ophoven felt that it was a combination of the preexisting injuries and injuries incurred just prior to going to the hospital that caused Mikey's death.

III

INSUFFICIENCY OF EVIDENCE TO SUPPORT CONVICTION OF FIRST DEGREE TORTURE MURDER

Defendant contends that the evidence was insufficient to support his first degree torture murder conviction because he did not have the intent to torture Mikey or cause him prolonged pain.

A. Standard of Review for Sufficiency Claims

"We often address claims of insufficient evidence, and the standard of review is settled. 'A reviewing court faced with such a claim determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citations.] We examine the record to determine "whether it shows evidence that is reasonable, credible and of solid value from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." [Citation.] Further, "the appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Moon* (2005) 37 Cal.4th 1, 22.)

B. Substantial Evidence Supported the Jury's Finding That Defendant Committed First Degree Torture Murder

Murder by means of torture, a statutorily listed type of first degree murder (§ 189), does not require an intent to kill, but it does require the intent to torture; it requires the same proof of deliberation and premeditation as is required of other kinds of first degree murder. (*People v. Steger* (1976) 16 Cal.3d 539, 546.) "The elements of torture murder are: (1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. [Citations.]" (*People v. Cook* (2006) 39 Cal.4th 566, 602.)

"[T]he severity of the victim's wounds is not necessarily determinative of intent to torture, because even the presence of severe wounds may be as consistent with 'an explosion of violence' as with torture. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 140; see also *People v. Raley* (1992) 2 Cal.4th 870, 888.) "[S]evere injuries may also be consistent with the desire to kill, the heat of passion, or an explosion of violence." (*People v. Mungia* (2008) 44 Cal.4th 1101, 1137.) However, intent to torture is a state of mind that frequently must be proved by the circumstances surrounding the commission of the offense, including the nature and severity of the victim's wounds. (*Crittenden,* at p. 141; *People v. Proctor* (1992) 4 Cal.4th 499, 531.)

"It is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. [Citation.] Rather, it is the state of mind of the torturer – the cold-blooded intent to inflict pain for person gain or satisfaction -- which society condemns." (*People v. Steger, supra,* 16 Cal.3d at p. 546.)

Here, the jury was instructed on torture murder that they must find "[t]he defendant murdered by torture if one, he willfully, deliberately and with premeditation intended to inflict extreme and prolonged pain on the person killed while that person was still alive; two, he intended to inflict such pain on the person killed for the calculated purpose of revenge, extortion, persuasion, or any other sadistic reason; three, the acts causing death involved a high degree of probability of death; and four, the torture was a cause of death." They were also instructed, "The term, quote sadistic purpose, close quotes, used in the jury instructions means that when the person acted with the intent to

cause pain to another person, the person also did so for the purpose of receiving pleasure or satisfaction by inflicting such pain upon the other person. [¶] The pleasure or satisfaction may be sexual in nature, but the law does not require that the nature of the pleasure or satisfaction be sexual."

Here, the sadistic nature of defendant's acts were evident from the circumstances surrounding how Mikey received his physical injuries, the fatal nature of his injuries, and the acts of torment defendant perpetrated on Mikey. No doubt the physical injuries suffered by Mikey showed that defendant intended to inflict pain on the child. Defendant hit Mikey in the abdomen so hard that his liver was lacerated, his bowels were injured, he had hemorrhaging around his kidneys, and a rib broke. Further, Mikey had an unexplained skull fracture, which the coroner opined could not have been caused by his bouncing off the bed and hitting the dresser, but rather had to have been caused by a severe blow to the head.

Assuming defendant was truthful in his statement, he forced Mikey to eat his own feces or face a beating.[8] He also indicated that he held Mikey up against the wall and kicked him in the chest. Further, the evidence showed that Mikey had a tear in his anus and hemorrhaging in his rectum, which the coroner believed was caused by blunt force trauma. Mikey had some sort of bruise or burning on his penis, which would have caused pain. Further, there was injury to Mikey's right testicle caused by blunt force trauma.

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[8] Although defendant was not truthful throughout his statement, it is inconceivable he would have lied about feeding Mikey his own feces.

Whether Mikey was punched or kicked in that area, certainly defendant would know that a blow to Mikey's testicle would cause significant pain. Further, defendant provided no explanation for the injury, unlike his admission to kicking the child in the chest.

According to defendant's statement, he admitted that he beat Mikey and then left for at least one hour to go to the video store. There was a receipt from the video store at the time of 10:06 p.m. Defendant put Mikey to bed and failed to advise Sieber that he had beaten Mikey. Mikey deteriorated throughout the night.

Further, the jury could accept Mestaz's testimony that defendant was laughing and joking at the hospital and police station with Cox. This could reasonably be interpreted by the jury to show that defendant did not care what happened to Mikey and was evidence of his sadistic nature.

In *People v. Whisenhunt* (2008) 44 Cal.4th 174, 201, the California Supreme Court upheld a conviction for first degree torture murder on facts similar to those presented here. In *Whisenhunt*, the mother of the young victim was living with defendant prior to the girl's death. The child had been seen with bruises prior to her death and appeared to be the subject of child abuse. (*Id.* at pp. 182-183.) The mother left the child home alone with defendant. When she returned, the girl was lying on the floor whimpering and had burn marks on her body. The girl later died at the hospital. (*Id.* at pp. 184-185.)

The California Supreme Court upheld the first degree torture murder conviction, finding, "The evidence of [the victim's] wounds support first degree murder by torture. The evidence indicates that she was brutally kicked or punched, and that, after she was

incapacitated, the perpetrator methodically poured hot cooking oil onto various portions of her body, repositioning her body so as to inflict numerous burns throughout her body, including her genital region. As we have stated, the jury may infer the required mental state for murder by torture from the condition of the victim's body. [Citation.] Here the condition of the body, with the numerous methodical burn wounds inflicted, abundantly supports the jury's finding that defendant had the willful, deliberate, and premeditated intent to cause extreme pain or suffering for a sadistic purpose."[9] (*People v.* Whisenhunt, *supra*, 44 Cal.4th at p. 201.) The Supreme Court also found that the conviction was supported by evidence that the defendant took advantage of being alone with the child in order to inflict the serious injuries and the deliberate attempt to dissuade her mother from calling the police or taking her to the hospital. (*Id.* at p. 202.)

The injuries suffered by Mikey clearly supported that defendant committed first degree torture murder. Defendant had no legitimate evidence, save his own self-serving statements, that these were misguided attempts at discipline. The injuries involved were not just the ones that led to this child's death, i.e. the injuries to his abdomen, but also the other obviously painful injuries, including the skull fracture and the injuries to his penis and right testicle.

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[9] Defendant tries to distinguish *Whisenhunt* by claiming that he never incapacitated Mikey and never poured oil on the child's body. This is a distinction without a difference. The acts committed by defendant -- forcing some sort of object into his rectum, bruising or burning his penis, and making him eat his own feces -- were equally as brutal as those committed in *Whisenhunt*.

Defendant relies on several cases that reversed a first degree torture murder finding (the same cases he argued to the lower court during his section 1118.1 motion to dismiss) that he claims are identical to the factual scenario here.[10]

In *People v. Steger, supra,* 16 Cal.3d 539, 549 the court concluded that the evidence was insufficient to support torture-murder instructions where the defendant stepmother beat her stepdaughter. In that case, the defendant repeatedly beat her stepdaughter over a one-month period, including a daily beating during the final week of the girl's life. The beatings included hitting her with a belt and a shoe on her buttocks, back, arm, and head. On the day before the girl's death, the defendant hit the child on the shoulder, knocked her down, pushed her, banged her head against the wall, and struck the side of her head. The girl suffered damage to her liver, adrenal gland, intestines, brain, and diaphragm, and she had fractures to her left cheek bone and her right forearm. The girl had lacerations and bruises covering her body from head to toe. (*Id.* at p. 543.)

The court accepted that such beatings were due to the stepmother's frustration with the child's behavior and were misguided attempts to discipline her. Specifically, the court held, "[T]here is not one shred of evidence to support a finding that [the defendant beat her stepchild] with cold-blooded intent to inflict extreme and prolonged pain. Rather, the evidence . . . paints defendant as a tormented woman, continually frustrated by her inability to control her stepchild's behavior. The beatings were a misguided,

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10 We note that the People have completely failed to provide any analysis of the cases cited by defendant or any cases in its favor.

irrational and totally unjustifiable attempt at discipline; but they were not in a criminal sense wilful, deliberate, or premeditated. [¶] . . . [S]everal distinct 'explosions of violence' took place, as an attempt to discipline a child by corporal punishment generally involves beating her whenever she is deemed to misbehave." (*People v. Steger*, *supra*, 16 Cal.3d at pp. 548-549, fn. omitted.)

Here, defendant claimed in his statement that he was trying to calm Mikey down when he held him against the wall and kicked him in the chest with his foot. He also claimed that he was just playing with Mikey when he threw him on the bed and Mikey bounced off. However, this does not explain how Mikey received the injuries to his rectum that the coroner explained was caused by some sort of object being forced into Mikey's rectum and anus. It does not explain how Mikey received an injury to his penis and his right testicle. Mikey's injuries to his internal organs were so severe they were caused by a very hard blow or blunt force trauma to the abdomen. The skull fracture would have been caused by significant force. Based on the nature of the injuries here, the jury could reasonably conclude that they not only caused Mikey's death, but also were done purely to cause Mikey pain.

In *People v. Walkey* (1986) 177 Cal.App.3d 268, Division One of this court reversed a torture-murder conviction where the mother's boyfriend killed her two-year-old son while he was babysitting with a blow to the abdomen that ruptured the child's intestines. The boy also had life-threatening injuries to his brain from being hit on the back of the head, fresh bruises on his face, and bite marks, one of which the defendant

admitted inflicting after the victim bit him. Sometime prior to the boy's death, the defendant had hit him in the abdomen, causing his spleen to hemorrhage; his liver was partially torn; and one of his ribs was fractured. (*Id*. at pp. 272-273, 276.) Evidence had been presented that the defendant resented having to take care of the boy, had been seen spanking the boy, and had yelled at the boy when he had a toilet-training accident. The *Walkey* court concluded that "the fact [that the victim] was beaten on numerous occasions shows only 'that several distinct "explosions of violence" took place, as an attempt to discipline a child by corporal punishment . . . .' [Citation.] [¶] . . . [T]his evidence merely shows the beatings [the defendant] inflicted . . . were 'a misguided, irrational and totally unjustifiable attempt at discipline . . . .'" (*Id*. at pp. 275-276.) The court also stated, "Such explosive violence on the part of the abusing adult, without more, does not support a torture murder theory." (*Id*. at p. 276.)

Here, not only did Mikey have the injuries that might have been consistent with a "disciplinary" beating, he also had other injuries that were not consistent with any conceivable discipline, however misguided. Would a misguided parent trying to impose discipline force a foreign object into their child's rectum, causing tears and inflammation? Would such a parent, even in an explosion of violence, bruise or burn their own child's penis? These injuries show that defendant had a sadistic purpose in hurting Mikey and intended to inflict significant pain sufficient to support his conviction for first degree torture murder.

We believe this case is more like that of *People v. James* (1987) 196 Cal.App.3d 272. In *James*, the court rejected that the injuries to a girl suffered over a five-month period were just an explosion of violence. We note that in *James* the court emphasized, "While a few of the physical injury incidents might be characterized as discipline-related, other evidence amply demonstrated James's sadistic nature." The court then relied on evidence that the girl was told to jump out of the window of a moving car and that the defendant forced the victim to lick urine off the seat of the car. (*Id*. at p. 293.)

Similarly here, defendant forced Mikey to eat his own feces or suffer more beatings. Moreover, as noted above, the injuries to Mikey's rectum and penis are not consistent with merely a misguided attempt to discipline him; they showed a sadistic purpose. Defendant tries to distinguish *James* by stating rather than wait several hours to seek medical attention like the defendant in *James*, "he rushed Mikey to the emergency room." (See *People v. James, supra*, 196 Cal.App.3d at pp. 293-294.) Defendant conveniently omits mention of the fact that he left Mikey to go to the video store for over an hour and he told Sieber when she came home that Mikey was fine and encouraged her not to wake him. Although later defendant did rush Mikey to the hospital, it was clearly after it was too late for his recovery and due to Sieber's insistence.

Although defendant relies on his own statement that he beat Mikey for 10 to 15 minutes to support this was just an explosion of violence, again it does not explain how Mikey received some of his injuries, including the bruise or burn on his penis and the hemorrhaging in his rectum. Further, it does not establish how Mikey fractured his skull,

as the coroner explained that just falling off the bed and hitting it against the dresser would not cause the extensive damage Mikey suffered. The jury could reasonably conclude that these acts, along with the injuries to Mikey's abdomen, the broken rib, the fractured skull, and numerous bruises on his body, showed that defendant acted with a sadistic purpose in harming Mikey. We will not reverse his conviction for first degree torture murder.

IV

REDUCTION TO SECOND DEGREE MURDER

Defendant contends that even if we reject his argument that there was insufficient evidence presented to support his conviction of first degree torture murder, we should reduce his conviction to second degree murder because his conduct only supports a second degree murder conviction.[11] His argument is somewhat confusing in that he appears to be arguing that his sentence constitutes cruel and/or unusual punishment under the state and federal Constitutions because his culpability is only that of second degree murderer, but he also cites to *Steger*, *Walkey*, and several other cases where the convictions were reduced to second degree murder due to lack of evidence of the intent to torture.[12]

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[11] Defendant requested such reduction to second degree murder in the trial court, but it was denied without comment.

[12] The People have interpreted defendant's argument as just a variation on the argument that there was insufficient evidence of first degree murder.

To the extent that defendant is arguing that his conviction amounts to only second degree murder, we have already concluded that the evidence supports his first degree murder conviction.

A statutory punishment may violate the state and federal constitutional prohibitions against cruel and/or unusual punishment "'if, although not cruel or unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' [Citation.]" (*People v. Thompson* (1994) 24 Cal.App.4th 299, 304; accord *Enmund v. Florida* (1982) 458 U.S. 782, 788 [102 S.Ct. 3368, 73 L.Ed.2d 1140].) In determining whether a sentence is disproportionate, the courts are to consider the nature of the offense, as well as the nature of the individual offender. (*People v. Dillon* (1983) 34 Cal.3d 441, 477, abrogated by statute on different points as stated in *People v. Chun* (2009) 45 Cal.4th 1172; *People v. Weddle* (1991) 1 Cal.App.4th 1190, 1197-1198.)[13] "This entails an examination of the totality of the circumstances surrounding the commission of the offense in the case at bar, including such factors as its motive, the way it was committed, the extent of the defendant's involvement, and the consequences of his acts" and such factors as the defendant's "age, prior criminality, personal characteristics, and state of mind." (*Thompson*, at p. 305.) The application of this proportionality analysis to reduce the

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[13] Defendant does not argue that his sentence was longer than for more serious crimes committed in California or that punishment for the same crime in another jurisdiction would be lesser, so we will not address these prongs of the cruel and unusual argument. (See *In re Lynch* (1972) 8 Cal.3rd 410, 426-427.)

conviction or punishment is the exception rather than the rule. (*Id*. at pp. 305-306; *Weddle,* at pp. 1196-1197.)

This case does not present an exception to the rule. Defendant committed heinous crimes against Mikey. His conduct amounted to first degree torture murder and nothing less. Not only did defendant savagely beat the child, including injuring his rectum, penis, and testicles, he left him afterward to go to the video store so he and his friend could play video games while Mikey lay dying in the other room. In the face of news that Mikey was likely going to die, he continued to laugh and joke with his friend. Nothing about the nature of the offense or defendant warrants reducing defendant's crime to second degree murder.

V

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

McKINSTER
J.